

Commenting on “Purpose” in the Uniform Commercial Code

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I. INTRODUCTION

The first word must be Karl Llewellyn's:

[C]onstruction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization. Borderline, doubtful, or un contemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the *same* reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense *in terms of the* reason; it provides a real stimulus toward, though not an assurance of, corrective growth rather than straitjacketing of the Code by way of caselaw.¹

The best statute could not anticipate every contingency and the best drafters must recognize the perils of writing in too particular terms. Any effort to construe and apply particular *Uniform Commercial Code* (“Code” or “UCC”) provisions in a manner indulgent of a “purposive” approach requires that the statute’s purpose be manifest. If the statute’s reason is clear, if the scope of a provision’s influence is revealed by its operation in the easy cases, then the difficult cases will not tug at the fabric of the law and render the statute a nullity when the enacted law most needs to matter. Hard law makes bad cases.

This Article describes the congruities and incongruities of applying a purposive interpretation to Code provisions. We intend nothing provocative; indeed, it would be provocative to suggest that a living organism such as the UCC should be applied in a manner inconsiderate of its “purpose.” Our object is to come to terms with the sources of purpose. What is it that counsel, courts,

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¹ Collection of Karl Llewellyn Papers, (J)(VI)(i)(e) at 5 (1994) [hereinafter Karl Llewellyn Papers] (unpublished manuscript on file at University of Chicago Law School), *quoted in* WILLIAM TWining, KARL LLEWELLYN AND THE REALIST MOVEMENT 321–22 (1973).

and transactors, for that matter, need in order to discern the law's reason that will determine their bargain, their rights when the bargain fails?

In Part II of this Article, we focus on section 1-102 of the Code, which establishes the prominence of purpose and policy in the construction and application of the UCC. A survey of pertinent history puts the findings of our empirical study into perspective. Then, in Part III, we examine the sources of "purposive" analysis (other than 1-102) that inform Code practice. We also come to terms with the role of "legislative history," including the official comments to the Code. Part IV provides a foundation for a critique of reliance on the official commentary. After describing the Code drafting process and considering analogous sources of official commentary, we conclude that the comments are a dubious source of legislative purpose. Ultimately, you might conclude that the UCC comments, though dressed-up, are attired no better than the notorious Emperor.

II. COURTS AND UCC SECTION 1-102

In this Part, we undertake two tasks. First, we outline the origins of subsections (1) and (2) of section 1-102,² and we explore some of the efforts by its drafters to mediate the perceived tension among some of its provisions. Second, we consider the effects of these two subsections by analyzing their use in court opinions. Our goal is to form some general impressions about the extent to which and for what purposes judges have relied expressly on subsections (1) and (2) in making their decisions. Our findings suggest that the purposes and policies set forth in section 1-102 have been the source of both broad and narrow interpretations of the language in particular sections. Courts also have responded to these purposes and policies as a source of confusion, as a mandate for values that courts cannot always harmonize.

² These subsections read as follows:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are:
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

A. Historical Notes

None of the earlier uniform acts superseded by the Code contained provisions similar to all of those set forth in the current version of subsections (1) and (2). They did, however, all provide in the same language that each Act "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."³ The text and background of this provision suggest a firm belief in the need for judicial checks on nonuniformity, particularly with respect to the interpretation of uniform laws. In short, this statutory directive recognized that the very arguments that called for uniform statutory law raised sharp questions about whether judicial interpretation of these statutes should continue to be independent from jurisdiction to jurisdiction.⁴

³ Uniform Trust Receipts Act §.18 (1933); Uniform Conditional Sales Act §.30 (1918); Uniform Stock Transfer Act § 19 (1909); Uniform Bills of Lading Act § 52 (1909); Uniform Warehouse Receipts Act § 57 (1906); Uniform Sales Act § 74 (1906). Although a provision calling for uniform construction was not included in the *Uniform Negotiable Instruments Act* of 1986, courts recognized that in order to accomplish the Act's objectives, the decisions of other states should be taken into account. *See, e.g., Broderick v. Bascom Rope*, 142 N.Y.S. 497 (Sup. Ct. 1913).

⁴ *See* 1 STATE OF N.Y. LAW REVISION COMM'N REPORT: STUDY OF THE UNIFORM COMMERCIAL CODE 134 (reprint ed. 1980) (1955) [hereinafter N.Y. COMM'N REPORT] ("The practical importance of statutory provisions stating a purpose of uniformity is to be found in the rule that decisions in other states construing the same provision of a uniform act are particularly persuasive when the same provision is before the court for the first time."). Indeed, the Permanent Editorial Board ("PEB") for the *Uniform Commercial Code* was created precisely because it would be in a position to help promote uniformity. *See* Report No. 1 of the PEB for the UCC (Oct. 31, 1962), 1 U.L.A. XXV, XXVII (1976) ("It shall be the policy of the [PEB] to assist in attaining and maintaining uniformity in state statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code."). As Llewellyn put it when drafting a *Revised Uniform Sales Act*: "[U]niformity of intent, construction and application is no less important to the dominant purpose of this Act than uniformity of language" REPORT AND SECOND DRAFT: REVISED UNIFORM SALES ACT § 1-A(2) (1941). *See* also the introductory comment to the Code, which provides in pertinent part:

Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction of this [c]omment and those which follow the text of each section set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

The March 1951 Draft of the Code first stated a rule of construction most similar to the present subsections (1) and (2). It provided:

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this Act are

(a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;

(b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.⁵

Subsection (1) was sufficient to dispose of the principle that statutes in derogation of the common law should be narrowly construed.⁶ This provision might well be defended on the ground that the resolution of ambiguities in statutes is sometimes a question of policy as much as it is law, and that courts are often uniquely well situated to make the relevant policy decisions. Frequently, legislation will not deal specifically with the precise question at issue. If the language of the statute does not serve as a clear predicate for a decision one way or the other, contesting versions of what the legislature intended will call for an assessment of which outcome is most sensible under the circumstances. This assessment is not the mechanical exercise of uncovering an actual legislative decision. It calls for a judgment undertaken in light of the statutory structure and applicable policy considerations.⁷

State Laws ("NCCUSL") and the American Law Institute ("ALI").

The objective of uniformity extends beyond the same legal construction in all the states that enact the uniform provisions. It also includes conformity with federal law, *see* *Commercial Nat'l Bank of New Orleans v. Canal-La. Bank & Trust Co.*, 239 U.S. 520, 528 (1916) ("This rule of construction requires that in order to accomplish the beneficent objective of unifying . . . the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act . . ."), and international commercial law, *see generally* Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L.A. L. REV. 43 (1991). (Comparing the United Nations Convention on Contracts for the International Sale of Goods with UCC Article 2).

⁵ XII ELIZABETH S. KELLY, *UNIFORM COMMERCIAL CODE DRAFTS* 26 (1984).

⁶ For a general discussion of this principle, *see* Jefferson B. Fordham & Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950).

⁷ A typically classical statement on the distinction between a liberal and strict construction of a statute reads as follows:

[A] statute is liberally construed when [the] letter [of the statute] is extended to include

To be sure, this call for a liberal construction was not entirely new. Indeed, the commentary on subsection (1) points out that courts have repeatedly applied the uniform commercial acts liberally.

The case law is summarized as follows:

Courts have been careful to keep broad acts from being hampered in their effects by later acts of limited scope. They have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act. They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply. Nothing in this Act stands in the way of the continuance of such action by the courts.⁸

In contrast to subsection (1), the provisions of subsection (2) generated some controversy. The main problem was the relationship between "precision and certainty," which are mentioned in paragraph (a), and "flexibility," mentioned in paragraph (b).⁹ We assume that most practicing attorneys and most sitting judges believe that one important end of a commercial code is legal certainty. Practitioners must be able to predict the legal effect of various forms of business activity and judges require doctrine that is certain and easy to apply.¹⁰ On the other hand, the drafters clearly understood that sometimes

matters within the spirit or purpose of the statute. A statute is strictly construed when [the] letter [of the statute] is narrowed to exclude matters which if included would defeat the policy of the legislation.

Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 58.06 (Clark Boardman Callaghan 5th ed., 1992).

⁸ U.C.C. § 1-102 cmt. 1 (1995) (citations omitted).

⁹ Another point of contention was the meaning of "commercial mechanism" in paragraph (b). See N.Y. COMM'N REPORT, *supra* note 4, at 141 ("The meaning of 'commercial mechanism' is not apparent."). Note the basic distinction between this provision and section 1-205 ("Course of Dealing and Usage of Trade"). In cases involving the interpretation of the parties' agreement, section 1-205 governs the problem. But in cases involving statutory interpretation, the provisions of section 1-102 are determinative. See *id.*

¹⁰ See, e.g., Donald J. Rapson, *Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 257 (1994) ("I start with the basic premise that the public interest is best served by having clear, concise, and efficient statutory rules so that the parties to a transaction can anticipate the issues and answers that may arise and guide their actions accordingly.").

codification fails because of the excessive rigidity of statutory commands. In light of the wide variety of contexts to which the Code must be applied, a degree of flexibility in implementation is quite healthy.¹¹

There is another reason for espousing a flexible approach to statutory construction. Sometimes codification is made more difficult because of the pervasive problem of changed circumstances. New developments involving technological capacity and business practices give rise to a serious risk of obsolescence.¹² Because the Code cannot be amended often enough to account for these changes, genuine problems arise for those who must apply the Code.¹³ In these circumstances, a grant of interpretive authority to courts, allowing them to take changed circumstances into consideration, seems to be a valuable, if partial, corrective.¹⁴

As critics of subsection (2) emphasized, however, there would be some

¹¹ This point is made by Grant Gilmore with considerable force:

[I]t is a matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior. Commercial codification cannot successfully over particularize: the penalty for being too precise is that the statute will have to keep coming in for repairs (and amendment is a costly, cumbersome, and unsatisfactory process) or else become a dead-letter.

Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1355 (1948).

¹² For a catalogue of the commercial innovations that have arisen since the adoption of the Code, see John F. Dolan, *Changing Commercial Practices and the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 579 (1993).

¹³ See Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 918 (1995) ("It takes anywhere from three to five years for a statutory change to have been studied, drafted, and first proposed for legislative enactment. This requires an enormous devotion of human and professional capital.").

¹⁴ From its inception, the Code was perceived by its drafters to be "a semi-permanent piece of legislation." U.C.C. § 1-201 cmt. 1 (1995). In particular, we are told in comment 1 to section 1-102, that the drafters intended "to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices." *Id.* Notwithstanding this original intent, the Code has continued to thrive as the primary source of commercial law only because of the willingness of the NCCUSL and the ALI to revise and refine its provisions when necessary. See *Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code*, 1987 A.L.I. PROC. 769, 770 [hereinafter *Agreement*] (discussing the need to revise the Code when necessary).

difficulty in administering the contradictory objectives of flexibility and certainty.¹⁵ The American Bankers Association went even further, flatly stating that the provisions in subsections (1) and (2) direct courts to proceed in what appear to be four different directions. The four are "liberally," "precision," "flexibility," and "uniform."¹⁶ To meet this criticism, these two subsections were redrafted in 1956 into what is now the present text of section 1-102.¹⁷

To begin to understand the judicial use of the Code's purposes and policies in construing Code sections, we look at the cases to see how often subsections (1) and (2) are brought into court opinions and the implications of their use. This would permit something akin to a legal impact statement, helping to determine the extent to which these subsections have actually contributed to the resolution of Code construction problems.

B. *The Empirical Study*

In the fall of 1995, we used the Uniform Commercial Code Reporting Service¹⁸ to initially determine the frequency of judicial citation to subsections (1) and (2). In all, the study turned up more than 300 different cases that cited one or both of the subsections. When a subsection was cited, we attempted to make a general assessment of its use by the judge writing the opinion. In this review of the cases and reflection on their meaning, we discerned that the Code policies enumerated in subsections (1) and (2) add an extra layer of empowerment and discretion, but they do not provide an extra layer of guidance and control.

At this juncture, we emphasize that this exercise in empiricism is not intended to be rigorous. The overwhelming bulk of our research lacks any but the most primitive controls, and much of it lacks even that. To answer with certainty the question of whether subsections (1) and (2) have had an impact on commercial law, it is not enough to look only at the explicit language of the

¹⁵ See, e.g., N.Y. COMM'N REPORT, *supra* note 4, at 138-39 (suggesting that these two objectives "may be not complimentary, but contradictory objectives"); Charles H. Willard, *The History of the Uniform Commercial Code*, document 29 at 1 (unpublished private history of the UCC on file in the Davis Polk and Wardell library in New York) ("The LRC Committee's point that precision and flexibility do not go together is well taken."); see also *President and Dirs. of Manhattan Co. v. Morgan*, 150 N.E. 594, 599 (N.Y. 1926) ("One of the debit items to be charged against codifying statutes is the possibility of interference with evolutionary growth. It is the ancient conflict between flexibility and certainty.").

¹⁶ See Report of Special Committee of the American Bankers Association 14 (Oct. 17, 1954).

¹⁷ See Willard; *supra* note 15, document 48, at 2-4.

¹⁸ See U.C.C. Rep. Serv. (CBC) (1986). We surveyed volumes 1-42 (original series) and 1-20 (2d series).

cases. Even in those instances in which one of the subsections appears in a citation that includes multiple sources of authority, or, if it was singled out, it did not seem to weigh heavily in the eventual decision, we cannot be absolutely sure what influence it had, if any, on the court's resolution of the case.¹⁹ There are a host of subtle processes through which Code purposes and policies can affect the outcome of a case yet not result in extensive discussion. For example, a court may be swayed more readily by arguments that use subsections (1) and (2), or it may rely on a case which itself was influenced by these subsections.

We believe that the cases enable us to develop a meaningful picture of the role played by the Code's purposes and policies. All real data have certain limitations. We have no reason to think that as an answer to the central question, the cases may misdirect more than they inform.

Some courts appear to draw ties between the purposes and policies outlined in section 1-102 and the specific language used in a Code section. That is to say, more than one court acted as if following the literal language of the Code gave rise to a presumption of compliance with the mandate expressed in section 1-102. For example, in *White v. Hancock Bank*,²⁰ the Mississippi Supreme Court refused to allow the payee of a fraudulent check to shift its loss to the depository-collecting bank in the absence of any attempt to show bad faith on the part of the bank.²¹ The court considered but then rejected the idea that "extra-legal notions of fairness and justice" should be given any weight.²² In fact, the opinion's penultimate paragraph is a ringing endorsement of literalism:

The statutorily declared purposes and policies of the UCC include "to simplify, clarify and modernize the law governing commercial transactions" regarding

¹⁹ Often judges merely refer to one or more of the purposes and policies set forth in section 1-102 at the beginning or end of their analyses as if it were a necessary invocation, see, e.g., *In re PA Record Outlet*, 7 U.C.C Rep. Serv. (CBC) 300 (W.D. Pa. 1988); *In re Bennett*, 6 U.C.C Rep. Serv. (CBC) 994 (Bankr. W.D. Mich. 1969); *Kearney & Trecker Corp. v. Master Engraving Co.*, 527 A.2d 429 (N.J. 1987), or benediction, see, e.g., *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. 1965); *E.S.P., Inc. v. Midway Nat'l Bank*, 447 N.W.2d 882 (Minn. 1989); *Welland Inv. Corp. v. First Nat'l Bank*, 195 A.2d 210 (N.J. Super. 1963), of commercial law.

²⁰ 477 So. 2d 265 (Miss. 1985). For additional cases suggesting that a literal reading of Code language furthers Code policies, see *In re Zwagerman*, 115 B.R. 540 (Bankr. W.D. Mich. 1990), *aff'd*, 125 B.R. 486 (W.D. Mich. 1991); *In re Callahan Motors, Inc.*, 396 F. Supp. 785 (D.C. N.J. 1975), *rev'd*, 538 F.2d 76 (3d Cir. 1976); *In re Wolf*, 9 U.C.C Rep. Serv. (CBC) 177 (Bankr. W.D. Mich. 1971); *In re Antekier*, 6 U.C.C. Rep. Serv. (CBC) 1027 (Bankr. W.D. Mich. 1969); *In re Carlstrom*, 3 U.C.C. Rep. Serv. (CBC) 766 (Bankr. D. Me. 1966).

²¹ See *Hancock Bank*, 477 So. 2d at 273.

²² *Id.*

the subjects of commercial paper and bank deposits and collections, the Code places a premium upon achievement of certainty in rules and obligations and predictability of consequences of behavior, for the notions of commercial justice and fairness that went into the shaping of Articles 3 and 4 would be seriously undermined by anything other than our sticking as closely as possible to the letter of the law.²³

In contrast to those courts which have suggested that compliance with section 1-102 requires the application of the "plain language" of other Code sections, many courts have perceived the section as a source of authority for liberal, pragmatic interpretations of the Code. Thus, we have found that courts have often used section 1-102 as a source of authority to supersede the requirements and conditions set forth in particular rules. For example, in *Strevell-Paterson Finance Co. v. May*,²⁴ the New Mexico Supreme Court held that a liberal construction of the requirements of Article 9 should dispense with the signature requirement of section 9-402(1).²⁵ In another case, the court thought it irrelevant that under the circumstances the buyer's demand for adequate assurance of performance under section 2-609 was not in writing.²⁶ Many "hard" cases implicate a wide diversity of policies. Because these policies often conflict, they must be ordered to determine which ought to be satisfied when we cannot satisfy all. Section 1-102 supposes that courts can combine these diverse policies into a single, consistent, preference ranking. This supposition, however, fails to do justice to the policies embodied in the diverse kinds of claims. Many of these policies are so distinct as to be incommensurable.

Consider, for example, the policies of uniformity and liberality of construction. In *In re Causer's Town & Country Super Market, Inc.*,²⁷ the court took exception to those cases that had refused to condemn as ineffective a financing statement that failed to contain the information required by section 9-402(1).²⁸ According to the court, "[s]uch liberality seems . . . to defeat the very

²³ *Id.*

²⁴ 422 P.2d 366 (N.M. 1967).

²⁵ *See id.* at 369.

²⁶ *See* *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167, 1171 (7th Cir. 1976). For additional cases noting that liberality rather than restriction of interpretation is necessary to fulfill the purpose and the spirit underlying the Code, see *In re Purity Ice Cream Co.*, 90 B.R. 183 (Bankr. D.S.C. 1988), *In re Piro*, 331 F. Supp. 171 (S.D. Cal. 1971), *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8 (Del. 1972), and *Alloway v. Stuart*, 385 S.W.2d 41 (Ky. Ct. App. 1964).

²⁷ 2 U.C.C. Rep. Serv. (CBC) 541 (Bankr. N.D. Ohio 1965).

²⁸ *See id.* at 546

uniformity sought by the Uniform Commercial Code."²⁹ In another case, *Ditch Witch Trenching Co. v. C & S Carpentry Services, Inc.*,³⁰ the court rejected the majority rule (thereby promoting nonuniformity) that section 1-207 was not intended to bar application of the accord and satisfaction doctrine.³¹ In its view, "a liberal construction . . . compels the conclusion that the common law doctrine of accord and satisfaction has been superseded by the passage of this statute."³²

Even if the possibility of coherent statutory interpretation is not undermined by the complexities of balancing the elements of section 1-102, courts must also consider a plethora of other pervasive Code purposes and policies.³³ But the cases offer little analysis as to how such purposes and policies ought to be recognized or conceived. Moreover, all of this is of little help in addressing the common circumstance in which purposes and policies may pull a court in different directions.

The use of court opinions to describe reactions to and use of section 1-102 is often made difficult by the fact that the decision may be consistent with the underlying purposes and policies of the Code, both in general and specifically with the underlying purpose and policy of the section under consideration. In evaluating cases, we might conclude then, that judicial references to general policies to secure resolutions on the merits may be misleading. In other words,

²⁹ *Id.* at 547; see also *In re Broward Auto Brokers, Inc.*, 11 U.C.C. Rep. Serv. (CBC) 402, 404 (Bankr. S.D. Fla. 1972) ("If each court or each jurisdiction went along its merry way waiving one or more specific requirements of the act in order to liberally construe the act, there would probably be a complete lack of uniformity.").

³⁰ 812 S.W.2d 171 (Ky. Ct. App. 1991).

³¹ See *id.* at 173.

³² *Id.*

³³ Just some of the Code policies located outside of section 1-102 include finality of commercial transactions, see *Fuscellaro v. Industrial Nat'l Corp.*, 368 A.2d 1227, 1231 (R.I. 1977); the avoidance of "expensive and delaying litigation," see *Von Gohren v. Pacific Nat'l Bank*, 505 P.2d 467, 474 (Wash. 1973); the allocation of liability and responsibility to the party best able to prevent them, see *Hartford Acc. & Indem. Co. v. American Express Co.*, 542 N.E.2d 1090, 1096 (N.Y. 1989); freedom to contract, see *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 74 (Colo. 1991); and "commercial reasonableness and preserving expectations," see *Schwarcz, supra* note 13, at 922.

Additionally, courts must also consider purposes and policies that are reflected in statutes external to the Code. See, e.g., *In re Eagles Nest, Inc.*, 57 B.R. 337 (Bankr. N.D. Ind. 1986) (where liquor licenses are concerned, the policies behind both the UCC and the Alcoholic Beverage Laws must be considered); *Vedder v. Spellman*, 480 P.2d 207 (Wash. 1971) (stating that notwithstanding section 3-801(1)(b), a payee may not sue on a dishonored check where action on the underlying contract was barred by a state statute providing that an unlicensed contractor may not maintain an action for compensation).

one could take the view that even though Code policies were drawn upon, the court was guided primarily by other concerns.³⁴ Indeed, the claim that specific policies are hierarchically superior to general considerations of simplification, clarification, modernization, expansion, and uniformity—that the specific “trumps” the general—has become an increasingly prominent theme in the Code literature.³⁵

In sum, then, it seems to us that the difficulty in defining and ordering terms such as “simplification,” “clarification,” and “modernization” suggests their inability to act as practical guides that limit the exercise of discretion. As one commentator recognized:

[S]tating that the Code is to be interpreted to further objectives does not in itself provide a precise standard for the determination of the outcome of a particular controversy. Otherwise stated, the mandate to interpret the Code so as to further its objectives does not furnish any real guide to construction because the purposes are of “an essentially neutral nature” and “a great deal will depend upon the vantage point of the one contemplating the problem.”³⁶

³⁴ See, e.g., *Barber-Greene Co. v. National Bank*, 816 F.2d 1267 (8th Cir. 1987) (exemplifying a ruling consistent with the policy expressed by the drafters in section 1-201(39)); *Commonwealth Edison Co. v. Decker Coal Co.*, 653 F. Supp. 841 (N.D. Ill. 1987) (exemplifying a ruling consistent with the policy expressed by the drafters in section 1-106); *Todsen v. Runge*, 318 N.W.2d 88 (Neb. 1982) (exemplifying a ruling consistent with the policy expressed in section 9-312(5)); *USX Corp. v. Union Pacific Resources Co.*, 753 S.W.2d 845 (Tex. Ct. App. 1988) (the court’s ruling is consistent with the policy expressed by the drafters in section 1-106); see also JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 4, at 16 (3d ed. 1988) (“Because courts so commonly cite not only 1-102, but also some more specific liberalizing section, it is difficult to know whether 1-102 independently influences liberal interpretation and construction.”).

³⁵ See, e.g., DONALD KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* 12 (1968) (“[T]he more generalized overall purposes are at times so general as to permit diverse interpretation and application. It is only by looking at the individual policies involved that a consistent interpretation by courts may be maintained . . .”).

³⁶ RONALD A. ANDERSON, *UNIFORM COMMERCIAL CODE* § 1-102:41, at 51 (3d ed. 1981). Referring to the objectives stated in section 1-102, Julian B. McDonnell wrote in a similar vein that

those objectives are stated with a generality that diminishes their usefulness. They may, in fact, also point in different directions. A court faced with the problem of the financing statement as a security agreement today would have to contend with the policy of simplification in section 1-102(2)(a), which supports the recognition of a financing statement as security agreement, and the policy of uniformity in section 1-102(2)(c), which, in light of the case law, supports the contrary result. Moreover, how is the jurist

It is not surprising, then, to see the wide range of approaches and effects that courts associate with section 1-102. With the foregoing account of the indeterminacy of the Code's general policies as a foundation, we now consider where to find the purposes and policies of individual Code sections.

III. OTHER SOURCES OF CODE PURPOSES

We have focused thus far on criticizing the generality of section 1-102 and have called into question the particular conception of intelligibility that it presupposes. This Part of the Article turns to other sources for ascribing a meaning or purpose to a Code section. Our strategy in this Part is twofold. First, we identify some of the traditional sources for locating the purposes and policies of individual sections, and we illuminate the ways in which these sources are inherently incapable of guiding courts to consistent decisions. Second, we develop an account of the aims and justifications for the official comments that follow each section. We conclude that the comments are the one place where the meaning of legislative decisions could be determined and given content.

A. *The Explicit Language of the Text*

Some commentators have suggested that the objectives of a section can sometimes be gleaned from the explicit language of the Code. Professor Hillman, for example, points out that courts routinely ignore the last sentence of section 2-708(2) in lost volume seller cases in order to carry out the stated purpose of the section, which is to put the seller "in as good a position as performance would have done."³⁷ To the extent that this view rests exclusively on the premise that a statute can express a meaningful purpose, it is mistaken. There is simply no way to determine from the text alone what the drafters would have done with an unforeseen problem had that problem been presented to them.³⁸

to assess which alternative will modernize the law governing commercial transactions in accordance with section 1-102(2)(a)?

Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 851-52 (1978).

³⁷ Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 680-81 (1977).

³⁸ Apart from the inevitable indeterminacy of statutory formulations, see, e.g., Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning"*, 33 ARIZ. L. REV. 529 (1991), inherent in any piece of legislation is what Professor Hart has called an "indeterminacy of aim." H.L.A. HART, *THE CONCEPT OF LAW* 125 (1961). To make this

Consider the case of a seller who holds completed goods on hand that are unsold at the time of trial. If the market price has fallen since the time of tender, where does that leave her? Under 2-708(1), there is little doubt that the seller is entitled to "the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . . but less expenses saved in consequence of the buyer's breach."³⁹ The problem is that an award under this subsection would not necessarily put the seller in the same economic position she would have been in but for the breach.⁴⁰ Can the seller now insist that her damages be determined by the lost profit formula of subsection (2)? The buyer would argue that the seller, who suffered no loss of volume, does not fall within any of the classes of sellers who have traditionally been permitted to proceed using 2-708.⁴¹ Moreover, if the seller does have rights under subsection (2), the court must take into account the fact that the seller still holds the goods, which can be sold.⁴²

point, Hart posits an ordinance barring vehicles from a public park. Although it may be clear that if the purpose of the law is to maintain peace and quiet the legislature intended to banish cars, buses, and motorcycles, it is unclear what other "vehicles" it intended to exclude:

We have initially settled the question that piece and quiet in the park is to be maintained at the cost, at any rate, of the exclusion of these things. On the other hand, until we have put the general aim of peace in the park into conjunction with those cases which we did not, or perhaps could not, initially envisage (perhaps a toy motor-car electrically propelled) our aim is, in this direction indeterminate. We have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs: whether some degree of peace in the park is to be sacrificed to, or defended against, those children whose pleasure or interest it is to use these things.

Id. at 126.

³⁹ U.C.C. § 2-708(1) (1995).

⁴⁰ Such would be the case, for example, if the seller eventually resold the goods at a lower price than the market price on the date of tender.

⁴¹ These include the lost volume seller whose supply of goods exceeds the demand, *see, e.g.*, *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, 826 F.2d 678 (7th Cir. 1987); *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982), the seller who stops production after breach, *see, e.g.*, *Bead Chain Mfg. Co. v. Saxton Prods., Inc.*, 439 A.2d 314 (Conn. 1981); *Detroit Power Screwdriver Co. v. Ladney*, 181 N.W.2d 828 (Mich. App. Ct. 1970), and the seller who never acquires the goods, *see, e.g.*, *Blair Int'l, Ltd. v. La Barge, Inc.*, 675 F.2d 954 (8th Cir. 1982). *See also* Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66 (1965).

⁴² On this point, Professors White and Summers write:

If the seller still holds the goods at the time of trial, the court will still have to determine

Whether the stated purpose of full compensation found in section 2-708(2) ought to govern its application in the foregoing example remains an open question. The uncertainty here stems, in large measure, from the fact that permitting the seller to recover her lost profit may perhaps encourage sellers to forego commercially reasonable efforts to resell.⁴³ Thus, ascribing a meaning or purpose to a Code provision is, in part, a process of determining how that particular provision might best be understood to fit with other statutory principles and policies. For this reason, we reject the view that the underlying objectives of a Code section can ever be deduced solely from the text.

B. Resort to Prior Drafts

It has been suggested that prior drafts and prior official texts of the Code can be significant resources for construing the purpose of Code sections.⁴⁴ If, however, the current statutory text cannot express a meaningful purpose, interpretation by reference to prior texts is also flawed. Any comparison of sections (past and present) has little relevance for determining the meaning of choices; as we have insisted, reasons and purposes are what count.

It is interesting to note that the 1952 text of the Code contained a section 1-

a figure to include as due credit for a putative resale even though the seller has not yet resold. If the court does not deduct some amount for due credit for resale, 2-708(2) will simply become a back door action for the price, and quite clearly the drafters did not intend that.

JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 267 (4th ed. 1995). Moreover, unlike a direct action for the price under section 2-709, there is no explicit requirement in section 2-708(2) that the seller "hold the goods for the buyer." U.C.C. § 2-709(2) (1995).

⁴³ Although Professors White and Summers recognize

that this opportunity to receive a more ample recovery under 2-708(2) than would be available under 2-708(1) will encourage the [sellers] of th[e] world to forego resale and to lie in the Johnson grass in hopes of a sizeable recovery under 2-708(2) and a later lucky resalé at a higher price,

they nonetheless "believe that the benefits to be gained [from the growth and development of 2-708(2)] outweigh these costs." *Id.* at 269. Now that it appears that the new Article 2 will contain an express proviso that the nonbreaching party is expected to mitigate damages, see U.C.C. § 2-703(b) (Discussion Draft Mar. 1, 1996), we hope that the courts will respond appropriately in circumstances where one is engaging in strategic activity. In any event, it seems obvious "that such cases will present novel and difficult questions both to the parties' lawyers and to the judges. *Id.*

⁴⁴ See McDonnell, *supra* note 36, at 807.

102(3)(g), which provided: "Prior drafts of text and comments may not be used to ascertain legislative intent."⁴⁵ Notwithstanding the fact that paragraph (g) first appeared in 1952, the comment to paragraph (g) surfaced earlier in the Proposed Final Draft of 1950. It explained that resort to prior drafts was precluded because "[f]requently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity. The only safe guide of intent lies in the final text and [c]omments."⁴⁶

⁴⁵ U.C.C. § 1-102(3)(g) (1952) (repealed 1956).

⁴⁶ N.Y. COMM'N REPORT, *supra* note 4, at 165-66. Some insight into paragraph (g) was offered by Professor Carl Fulda:

To understand the background of this provision, it is, perhaps, appropriate to recall that the two sponsoring organizations have worked on the Code for more than ten years. According to the statement following the title (pages 2 and 3 of the 1952 Official Draft), the preparation of the Code as a joint project of the two sponsoring bodies was begun on January 1, 1954. But prior to that time the National Conference had been working on this project for several years. For instance, a Proposed Final Draft No. 1 of the Uniform Revised Sales Act, designated as "Sales Chapter of Proposed Commercial Code," was submitted to the Council of the American Law Institute at its meeting in May, 1944. In May, 1949 a draft of the entire Code was submitted by the two sponsoring organizations to the 26th Annual Meeting of the Institute, in joint session with the National Conference. In the spring of 1950 this was followed by a "Proposed Final Draft" of the entire Code. Additional revisions were made in 1951, and in 1952 the Institute and the Conference published the "Official Draft" which represent[s] the final product and contains for the first time present paragraph (g).

However, even this was not final. Numerous recommendations for changes in the text and comments of the "Official Draft" were received by the Editorial Board. Many of these were approved by the two sponsoring organizations, and these changes were published late in 1953 in a Supplement to the 1952 Official Draft.

In addition, the sponsoring organizations reopened consideration of the Code for the purpose of studying the advisability of changes in the light of objections made at the various public hearings conducted by the Law Revision Commission from February to April, 1954, and in the light of criticisms advanced in the study of the Code by the Commission and by agencies in other states.

Section 1-102(3)(g), together with paragraph (f) referring to the [c]omments, constitutes an attempt to establish a proper boundary between what shall be considered as relevant "legislative history" and what shall not be so considered. The most diligent search has revealed no precedent for such a provision.

The validity of such a provision is doubtful. Traditionally, the courts have determined what materials should be considered as relevant "legislative history"; in other words, the question of admissibility of extrinsic aids has been a matter for the court's decision, and courts have generally been liberal in examining "the events leading up to the introduction of the bill out of which the statute under consideration developed."

Subsequently, this provision was deleted from the Code.⁴⁷ While we do not wish to debate the wisdom of this decision,⁴⁸ we contend that the underlying purposes of a Code section cannot simply be constructed out of a series of drafts of texts considered in complete isolation from the deliberative process by which they were formulated and expressed.

C. Pre-Code Law

In the view we have been developing here, the meaning or purpose of any Code section can only be found if the drafters offer articulate and convincing reasons for their decisions. If pre-Code law establishes anything about the objectives of individual sections, it is that often it offers no rationally compelling ground for choosing one objective over another. That is, no historical vantage point suggests that one objective is more likely to be correct than another. In these cases, any reasonable approach may be adopted.

The point becomes more vivid by examining the "basis of the bargain" requirement for an express warranty under section 2-313. Under the *Uniform Sales Act*, actual reliance by the buyer on a statement was a necessary element in a warranty case.⁴⁹ Section 2-313 omits any reference to reliance, substituting

N.Y. COMM'N REPORT, *supra* note 4, at 163-64.

⁴⁷ The comments to the 1956 Recommendations of the Editorial Board for the *Uniform Commercial Code* state that "paragraph (3)(g) was deleted because the changes from the text enacted in Pennsylvania in 1953 are legitimate legislative history." Exactly what does this mean? "Is this intended to suggest that changes made prior to the 1952 edition adopted in Pennsylvania are *not* clearly legitimate legislative history? And to what extent *should* changes made by a drafting group, unconnected to the legislature, be considered as legitimate legislative history?" E. ALLEN FARNSWORTH ET AL., CASES AND MATERIALS ON COMMERCIAL LAW 9-10 (5th ed. 1993).

⁴⁸ Some were undoubtedly glad to see paragraph (g) go. See 1956 NEW YORK LAW REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 26.

Although the Commission does not object to statement in the Code of rules of construction supplementary to the rules ordinarily applied to statutes (Section 1-102), it does not believe that courts and lawyers should be prevented or discouraged from using the many rules of interpretation ordinarily employed to determine meaning of text.

Id. However, not all would agree that such a limitation on the freedom of judges to do what they might wish to do was such a bad idea. See WHITE & SUMMERS, *supra* note 34, at 11 ("In our opinion they should have left it in.").

⁴⁹ An affirmation of fact or promise created an express warranty under the *Uniform Sales Act* only "if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." *Uniform Sales Act*

the basis of the bargain language.⁵⁰ Was this substitution intended to avoid a requirement that the buyer show reliance in every breach of express warranty case?⁵¹ The question is of both considerable theoretical interest and immense practical importance. If a buyer need not rely on the promise, affirmation, description, or model or sample to recover, section 2-313 will indeed have worked a revolution in the law. It is not our purpose here to suggest what the drafters intended. The nature of the case law can best be ascertained, however, by considering the following statement:

It would be less than accurate to characterize the case law as manifesting a split of authority between those cases which insist upon a showing of reliance and those which reject that requirement. The confusion is much deeper. . . . [S]ome courts initially state that reliance is required, only to later suggest that in fact it is not or may not be required. Other courts initially state that reliance is not required, but proceed to suggest that it is required, either expressly or through some kind of inducement. Moreover, these cases may very well cite each other as authority.⁵²

At least as a general rule, the confused state of the law on this issue argues powerfully in favor of the notion that in some cases, there is simply no answer to the interpretive question if it is posed as an inquiry into pre-Code law. In these circumstances, historical context is insufficient for decision. The resolution of the ambiguity calls for an inquiry into extra-textual statements by the drafters of both policy and principle.⁵³

§ 12 (1906).

⁵⁰ Under section 2-313(1) express warranties can be created in several ways: (1) by an affirmation of fact or promise; (2) by a description of the goods; and (3) by a sample or model of the goods. Regardless of how the warranty is said to arise, no obligation is imposed on the seller unless the statement, description, or sample or model is "part of the basis of the bargain." U.C.C. § 2-313(1) (1995).

⁵¹ What the drafters of the Code intended by the phrase "basis of the bargain" has been a source of perpetual confusion. *See, e.g., WHITE & SUMMERS, supra* note 38, at 491.

The extent to which the law has so been changed is thoroughly unclear. It is possible that the drafters did not intend to change the law, or that they intended to remove the reliance requirement in all but the most unusual case, or that they intended simply to give the plaintiff the benefit of a rebuttable presumption of reliance.

Id.; *see also* N.Y. COMM'N REPORT, *supra* note 4, at 393 ("'[B]asis of the bargain' does not convey a definite meaning.").

⁵² John E. Murray, Jr., "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 304 (1982).

⁵³ We think it vital to an intelligent interpretation of the basis of the bargain requirement

D. *The Comments*

As previously discussed in Part II, courts ought to be especially cautious in attributing too much weight to many of the standard sources of statutory meaning when they are seeking to determine the underlying objectives of individual Code sections. Yet emphasis on the centrality of reasons and purposes to the application of Code text assumes that there be at least one appropriate place where the underlying objectives of individual sections can be articulated and expressed. Indeed, many of the criticisms we have leveled against the traditional sources of meaning would not apply to a direct statement of purpose by the drafters.⁵⁴ This suggests that there be an institutional device and practice to create opportunities for the drafters to state the reasons and arguments for their decisions. The most institutionalized example of this process is the "official comments" that follow each Code section.⁵⁵

Even before the Code project began, Llewellyn recognized the practical necessity of statutory commentary.⁵⁶ For instance, while chairman of a

that one consider the comments to § 2-313. Comment 3 states that "no particular reliance on [affirmations of fact] need be shown in order to weave them into the fabric of the agreement." U.C.C. § 2-313 cmt. 3 (1995). Comment 7 also argues against the need to prove reliance. It provides that "[t]he precise time when words of description or affirmation are made or samples are shown is not material. . . . If language is used after the closing of the deal . . . the warranty becomes a modification." U.C.C. § 2-313 cmt. 7 (1995). By recognizing the possibility that warranties can arise after the sale has been completed, this comment takes a position which is presumably inconsistent with the idea that a buyer is required to show some sort of reliance on the seller's statements.

⁵⁴ For an illuminating discussion, see McDonnell, *supra* note 36, at 830-41. McDonnell notes that "[b]ecause statements of purpose tend to be less abstract, they assist the interpreter with problems of ambiguity and vagueness that adhere in the Code text." *Id.* at 841.

⁵⁵ For a general overview of the format of the comments, see Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 606-08. Professor Skilton points out that although the comments were referred to as "official comments" in the 1950 Draft, "[t]he adjective 'official' is not used in the present version to describe the comments, unless one takes the designation 'Official Text With Comments' to mean 'Official Text With Official Comments.'" *Id.* at 597 n.1.

⁵⁶ See, e.g., Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 963 (1990) [hereinafter *U.C.C. Comments*] (noting the great influence that Professor Williston's extensive commentary on the *Uniform Sales Act* had on courts and presumably, on Llewellyn and the drafters of the UCC); see also TWINING, *supra* note 1, at 327 (explaining that the idea for Code comments had its genesis in Williston's commentary). Despite its appeal, Llewellyn was aware of the antidemocratic nature of extra-textual commentary. See REPORT AND SECOND DRAFT: REVISED UNIFORM SALES ACT § 1A cmt. 2 (1941) ("[It is] no pleasant anomaly in a legal system which has not hitherto taken pleasure in the delegation to private

committee charged with amending the *Uniform Negotiable Instruments Act*, he declared:

It is not enough that the law should be "clear," if it is not clear to those who decide cases. It is to be remembered that the Negotiable Instruments Law was accompanied by no such inclusive commentary as accompanied the Sales Act. Thanks to Williston's commentary on the latter, it was well nigh impossible for courts to seriously misconstrue the act; it was close to impossible to read one section without reference to other pertinent sections; indeed, even those portions of the act which in themselves were drafted with less adequacy had their inadequacy cured by the clear presentation in the commentary of their background and intent.⁵⁷

To Llewellyn, what seemed to be crucial was that courts have ready access "to *some* reason and theory of purpose and organization" so that they would be better able to coherently account for Code text and context, and more general legal policies and principles implicated by the statute.⁵⁸

It helps to appreciate some history here. Llewellyn's continuing appreciation of the importance of commentary again manifested itself in the *Uniform Revised Sales Act*,⁵⁹ and, later, in the early drafts of the Code.⁶⁰ The

persons of essentially legislative power.""). For more on the antidemocratic nature of the Code comments, see *infra* notes 102–20 and accompanying text.

⁵⁷ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 144, 145 (1933).

⁵⁸ Karl Llewellyn Papers, *supra* note 1, at 5. It is this principle that Llewellyn referred to as "the principle of the patent reason." *Id.*

⁵⁹ Section 1(2) of the 1944 Proposed Final Draft of the *Uniform Revised Sales Act* provided: "The [o]fficial [Joint] [c]omments of [the National Conference of Commissioners on Uniform State Laws and] the American Law Institute may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application." UNIFORM REV'D SALES ACT § 1(2) (Proposed Final Draft 1944). Interestingly, the comment to section 1 claimed for itself and its brethren a status beyond that of legislative history. It read:

Under [s]ubsection (2) the courts are expressly authorized to consult the [c]omments in interpreting and applying the principles of the Act. The [c]omments thereby acquire a status more than equivalent to that of a Committee Report on the basis of which a proposed bill has been enacted by the legislature.

Id. § 1 cmt. 1.

⁶⁰ In the very first draft of the Code, Llewellyn included a provision that was almost a verbatim replication of section 1 of the *Uniform Sales Act*. See U.C.C. § 1-102(2) (May, 1949).

1952 official version of the Code provided in section 1-102(3)(f) that "[t]he [c]omments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construction and application of this Act but if text and comment conflict, text controls."⁶¹ Although this section was dropped from the Code in 1957, we learn that it was not because the comments were no longer perceived to be an integral part of the Code, but rather, because "the old comments were clearly out of date and it was not known when new ones could be prepared."⁶² Since then, no reference to the comments has reappeared in the text. It would be a mistake to conclude, however, that their persuasive force has diminished.

The theme that the comments continue to be an indispensable aid in determining the intent of the drafters is foreshadowed in the introductory comment to the Code: "To aid in uniform construction of this [c]omment and those which follow the text of each section set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction [sic]."⁶³ It is one thing to recommend the use of the comments as an abstract principle; the real test of their influence is the extent to which courts have used them as the real

⁶¹ U.C.C. § 1-102(3)(f) (1952).

⁶² AMERICAN LAW INSTITUTE, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 3 (1957). Alternatively, one may reasonably believe that the real reason why the drafters decided to eliminate the reference to the comments from the text was that they were eager to placate the influential New York Law Revision Commission. The Commission was openly hostile to section 1-102(3)(f). It believed that such a provision was "unnecessary and could lead to unprecedented use of the [c]omments to expand and qualify the text." NEW YORK STATE LAW REVISION COMM'N, 1956 REPORT OF THE N.Y. STATE LAW REVISION COMM'N 25 [hereinafter N.Y. LAW REVISION COMM'N REPORT].

⁶³ U.C.C. § 1 (1995) (General Comment of the NCCUSL and the ALI). Moreover, the word "purposes" can be found in the heading of each comment. In this vein, Professor Skilton listed several reasons why courts should pay particular attention to the comments:

A particular reason for making use of the comments is that they may be viewed as part of the legislative history of the Code. This view gives the comments a special dignity. A more general reason is that they express opinions on meaning and purpose of text and were written by men who supposedly either participated in the drafting of the sections involved or were close to those who did.

Skilton, *supra* note 50, at 602-03. For an article that depicts the comments as being the product of special interest groups and argues that, as such, they are not worthy of judicial deference, see Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993, 1007-15 (1995). While we agree with Professor Walker's ultimate conclusion, we do so for entirely different reasons. See *infra* notes 102-20 and accompanying text.

grounds of decision.

For present purposes it will be useful to begin by distinguishing among the several sorts of functions served by the individual comments. All of them are pervasive.

A comment may be (1) expository—seeking to describe the meaning and application of a section of the Code and its relationship with other sections, (2) gap-filling—seeking to suggest answers to questions not precisely covered by the text, or (3) promotional and argumentative—seeking to “sell” a controversial section. And so forth. The classifications are not mutually exclusive.⁶⁴

Some functions are highly controversial, but they play an extremely prominent role in Code interpretation. To be sure, “[t]he courts take to the comments like ducks to water, even though the legislatures did not enact the comments.”⁶⁵

An example of the central idea here is former comment 3 to section 2-507. Section 2-507(2) gives a seller the right to reclaim goods from a cash buyer who has paid with a “rubber check.”⁶⁶ But unlike section 2-702(2), which permits a seller to recover goods from a credit buyer who has received the goods while insolvent, section 2-507(2) is silent on the question of when the demand for reclamation must occur.⁶⁷ Before it was amended in 1990, comment 3 to 2-507 contained an unexplained assertion: “The provision of this

⁶⁴ Skilton, *supra* note 55, at 608.

⁶⁵ WHITE & SUMMERS, *supra* note 34, at 12; *see also* Walker, *supra* note 63, at 1013 (“Courts have cited the comments thousands of times, often affording them great weight.”); Note, *U.C.C. Comments*, *supra* note 56, at 975 (“In the great majority of cases, courts cite the [c]omments to support the application or purpose described in them.”).

⁶⁶ Even though payment is by check, the transaction is considered to be a cash sale. No credit is extended. *See In re Samuels & Co.*, 526 F.2d 1238, 1241 (5th Cir. 1976). In such cases, section 2-507(2) provides that “[w]here payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.” U.C.C. § 2-507(2) (1995). Under section 2-511(3), “payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.” U.C.C. § 2-511(3) (1995).

⁶⁷ Section 2-702(2) provides in pertinent part:

Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply.

U.C.C. § 2-702(2) (1995).

Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.”⁶⁸ Relying on this comment, several courts have unhesitatingly imposed a ten day limit on reclamation applicable to cash sales.⁶⁹

Here courts ought to be extremely cautious in attributing persuasive weight to the comment. Comment 3 is frankly designed to produce particular outcomes. By following this comment on a matter that does not appear in the statutory text, courts risk carrying out policies that cannot be tied to any legislative judgment.⁷⁰ The problem has arisen in many other cases where the comments seem designed to function more as legislation than merely as a means of discerning the meaning of statutory language.⁷¹

⁶⁸ In 1990, the Permanent Editorial Board for the *Uniform Commercial Code* amended comment 3 by deleting the reference to a ten day limitation and substituting in its place an explicit statement that “[t]here is no specific time limit for a cash seller to exercise the right of reclamation.” PEB Commentary on the Uniform Commercial Code: Commentary No. 1, at 4 (1990), reprinted in U.C.C. Rep. Serv. 2d (CBC) (Findex/PEB Commentaries 1990).

⁶⁹ See, e.g., *Szabo v. Vinton Motors, Inc.*, 630 F.2d 1 (1st Cir. 1980). The court held

that the ten day limitation period contained in [c]omment 3 provides a more certain guide for conducting commercial transactions than the common law yardstick of “reasonableness,” and that it will encourage cash sellers to make prompt presentment. Any extension of the ten day limitation period based on the realities of the commercial banking world is for the legislature, not for this Court.

Id. at 4. Analytically, the court’s opinion is unsatisfying. As Professor Walker notes: “[T]he First Circuit announced the curious view that the comment merited weight and should only be changed by legislation, even though the comment itself had never been enacted.” Walker, *supra* note 63, at 1015. Now that the PEB (a nonlegislative body) has acted to change the comment one wonders whether the First Circuit would, if presented with the same issue today, reach a different conclusion.

⁷⁰ For example, the PEB commentary on 2-507(2) leaves little doubt that “[t]here is no justification for barring the cash seller’s right or remedy of reclamation before discovery of non-payment.” PEB Commentary, *supra* note 68, at 4.

⁷¹ See, e.g., WHITE & SUMMERS, *supra* note 34, at 13 (“[T]he comments depart from the text in two different ways. They sometimes expand on, and therefore go beyond the text, and they sometimes restrict or narrow the meaning of the text.”); Note, *U.C.C. Comments*, *supra* note 56, at 975–85 (discussing several instances where the “[c]omments [are] acting as Code”). The point is explicitly recognized by the New York Law Revision Commission in its criticism of the comments:

A more serious objection arises from instances in which the [c]omments appear to qualify the text or to add further rules not supported by the text. (See, e.g., Comments 1, 6, and 9 to Section 1-205, Comment 2 to Section 2-205, Comments 4, 8 and 13 to

What bearing does this observation have on the overall impact of the comments on commercial litigation? In the period before the Code, courts often departed from the literal meaning of commercial acts in cases in which literalism produced absurdity or irrationality.⁷² Under the Code, similar departures should also be expected, but here the principle agent is the comments rather than the judiciary. Yet, the courts are most likely to be in a good position to know whether the application of a Code section, taken in the context of a dispute is in fact irrational or absurd. Whether or not this is a persuasive argument, most courts continue to follow the comments.⁷³

IV. THE CODE DRAFTING PROCESS

Our inquiry now turns to the processes that determine the formulation of the UCC "black letter" and comments. An appreciation of the sponsoring organizations' methods informs construction of the finished product. First we focus on the text, the black letter, what we think of as the enacted law. Then we turn our attention to our primary focus, the drafting of the comments and the way in which those two drafting processes interact. We compare the Code comment drafting process with some analogous commentary drafting regimes and reveal certain fundamental incongruities. Those discoveries will support our critique of the courts' deference to the Code commentary.

Recently, the UCC drafting and revision processes have been the subject of substantial commentary.⁷⁴ The object of this Part of this Article is not to recount the terms of the discussion. Rather, our description of the process that

Section 2-320, Comments 1 and 2 to Section 2-508, Comment 4 to Section 2-509, Comment 5 to Section 2-607, Comment 2 to Section 3-510, Comment 2 to Section 4-212, Comment 9 to Section 4-403, Comments 1 and 4 to Section 7-501, Comment to Section 8-303, Comment 3 to Section 8-313, Comment 8 to Section 9-204, Comment 5 to Section 9-318.).

1956 N.Y. LAW REVISION COMM'N REPORT, *supra* note 62, at 23.

⁷² See U.C.C. § 1-102 cmt. 1 (1995).

⁷³ Referring to the frequent disparity between Code text and comment, White and Summers note: "In some instances, the comments are sounder than the text, and in others, they are not. But disparity or no, most courts follow the comments." WHITE & SUMMERS, *supra* note 34, at 13.

⁷⁴ See, e.g., Peter A. Alces, *Roll Over Llewellyn?*, 26 LOY. L.A. L. REV. 543 (1993); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994).

produces the black letter of a new or revised article of the UCC is designed only to provide the basis to contrast the text drafting process from the process that determines the sum and substance of the comments. Only if the courts applying Code provisions appreciate the genesis of the comments will they be in a position to afford them due weight. Indeed, it would seem that legislatures, as well as individual state law reform committees and commissions, would better realize the ALI and NCCUSL objectives if they understand the contexts in which both black letter and comments are forged.

A. Drafting the Black Letter

Though the original Code may well have owed more to the insights of one man, Karl Llewellyn, than does any version of any subsequent reformulation of or addition to the Code, the primary responsibility for drafting the uniform commercial law, at least in the first instance, is in the control of a group, albeit a very small and discrete group. This group is not the Permanent Editorial Board for the UCC,⁷⁵ though several of the members of the PEB exert considerable control over revision of the Code.⁷⁶ (That is not intended as a criticism, though some have expressed reservations about the status quo.⁷⁷) And while procedures that govern the coordination of the various interests' revision of the Code are accessible to those who would peruse the documents and memoranda generated by the several constituencies, most of the decisions that matter are left to the judgment of the very capable principals.⁷⁸

⁷⁵ The PEB is the product of a joint venture between the NCCUSL and the ALI. As of the date of publication, the members are Geoffrey Hazard, Jr. (Chair), Boris Auerbach, Marion W. Benfield, Jr., Gerald L. Bepko, Amelia H. Boss, Lawrence J. Bugge, William M. Burke, K. King Burnett, Ronald DeKoven, Bion M. Gregory, Frederick H. Miller, Donald J. Rapson, Curtis R. Reitz, and Carlyle C. Ring.

⁷⁶ For example, U.C.C. Revised Article 1, Drafting Committee Chair: Boris Auerbach, Members: Amelia H. Boss, Marion W. Benfield, Jr., Gerald L. Bepko, Curtis R. Reitz; UCC Revised Article 2A Leases: Reporter Marion W. Benfield, Jr., UCC Revised Article 2B Licenses, Drafting Chair: Carlyle C. Ring, Member: Amelia H. Boss; UCC Revised Article 9 Secured Transactions, Sales of Accounts, Chattel Paper, and Payment Intangibles, Consignment, Chair: William M. Burke, Members: Marion W. Benfield, Jr., Donald J. Rapson. See *The American Law Institute Annual Reports*, 73 Annual Meeting 184, 191 (May 1996).

⁷⁷ See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

⁷⁸ The reporter is chosen by Professor Frederick Miller, Executive Director of the NCCUSL. The American Bar Association and ALI representatives are chosen by their respective bodies. See Telephone Interview with John McCabe, Legislative Director/Legal Counsel for the NCCUSL (Aug. 8, 1996). The ABA and ALI representatives are selected by

Once a suggestion is made that a particular Code project be undertaken by the sponsoring organizations, a study is conducted to see if the project would be worthwhile. The membership of the study group is diverse, at least in the commercial law sense. After some time studying the need for reform, the study group inevitably concludes that reform is necessary.⁷⁹ There is, apparently, no glory in maintaining the status quo.⁸⁰ Once the sponsoring organizations resolve to go ahead with the reform project, a reporter is selected and the rest of the Drafting Committee is filled out.⁸¹ Once the Drafting Committee is assembled, the reporter sets to work writing or rewriting the commercial law. The reporter is the primary (actually, for all intents and purposes the sole) drafter of the new or revised law. While there will be no shortage of people looking over his or her⁸² shoulder, in the first instance the reporter determines the form and substance of the black letter. Others react to what the reporter writes, but in no real way is it accurate to assume that the reporter merely reports the conclusions of others.⁸³

The reporter's job is not an easy one, and the real compensation is in professional prestige rather than monetary form.⁸⁴ Further, good reporters are hard to find. But once found, the reporter sets to drafting the law, though the first steps might be tentative.⁸⁵ The reporter will present the product of his labors to the Drafting Committee, both through preliminary meetings as well as through a full meeting of the Committee, which others interested in the project may and will attend. It is at such meetings that the reporter earns his money.⁸⁶

The draft black letter, accompanied perhaps by some notes, prepared by the reporter, explaining the reasons supporting his formulation of a provision,⁸⁷

individuals (Director of ALI, Chair of ABA's UCC Committee) within those groups perhaps with the input of some others, but are not identified through a formal selection process. *Id.*

⁷⁹ No study group has yet decided that revision is unnecessary. *See* Telephone Interview with John McCabe, *supra* note 78.

⁸⁰ *See* Schwartz & Scott, *supra* note 77, at 610-15.

⁸¹ *See* Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 17 (1991) (citing HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 511 (1989)); *Agreement*, *supra* note 14, at 772-75 [hereinafter *Agreement*].

⁸² Professor Soia Mentschikoff, wife of Karl Llewellyn, is, so far, the only woman to serve as a reporter on a UCC project. Professors Mentschikoff and Llewellyn worked together on the original UCC project.

⁸³ While the first draft is prepared solely by the reporter, subsequent drafts reflect the input of others. *See* Telephone Interview with John McCabe, *supra* note 78.

⁸⁴ *See id.*; *see also* Bugge, *supra* note 81, at 15.

⁸⁵ *See* Bugge, *supra* note 81, at 17.

⁸⁶ *See id.* at 15.

⁸⁷ *See* U.C.C. § 2-316 notes (Discussion Draft for 1996 Annual Meeting of NCCUSL

or posing questions for the Drafting Committee and others to consider,⁸⁸ is sent to the members of the Drafting Committee and other interested observers⁸⁹ for their review prior to the meeting of the Drafting Committee and reporter. At this stage, any "notes" appended to particular provisions are not likely to be "draft" comments, though it may be that the reporter will draw on those notes when the time comes to write the comments.⁹⁰

The reporter will generally send with the draft a cover memorandum describing the status quo of the project, as well as, perhaps, drawing the readers' attention to matters of particular concern.⁹¹ But when the meeting begins, and each meeting lasts about two and one half days,⁹² it takes a talented chair and focused reporter to maintain the forward progress of the deliberations. There are some "hot" issues,⁹³ for which particular interests are lying in wait,⁹⁴ and there are some matters that barely warrant any mention

July 1996) ("At the 1995 Annual Meeting of the NCCUSL, the [commissioners] voted to delete the bracketed language in subsection (e). It has been restored with some modifications for further discussion.").

⁸⁸ See, e.g., U.C.C. § 2-709 notes (Discussion Draft for 1996 Annual Meeting of NCCUSL July 1996) ("There is no comparable provision in the Convention [on the International Sale of Goods]. Is Section 2-709 [sic] a rule of validity within Article 4(a)? If so, should Article 2 say so?").

⁸⁹ The NCCUSL will distribute copies of drafts and pertinent memoranda and correspondence upon the request of interested parties.

⁹⁰ Some of the notes included within discussion drafts read like comments. See, e.g., U.C.C. § 2-318, note 2 (Discussion Draft for 1996 Annual Meeting of NCCUSL July 1996):

Section 2-318 deals with warranty claims by a buyer or lessee . . . against "the seller" with whom there is no privity of contract. See Section 2-313(a) for the definitions. The remote buyer may be a commercial or a consumer buyer who claims economic loss, including damage to goods sold, but not injury to person or property other than the goods sold. See Section 2-319. The section also deals with "remote" lessees.

⁹¹ See, e.g., Memorandum from Richard E. Speidel, Reporter to Article 2 Drafting Committee (Jan. 4, 1995). Similar memoranda may be distributed prior to the annual NCCUSL meetings. See, e.g., Richard E. Speidel, Article 2, Sales, Progress Report to NCCUSL, July, 1996 Draft (on file with authors).

⁹² Most of the work of the Committee is accomplished during the first two days of the meeting. Given the participants' travel schedules, the morning of the third day, generally a Sunday morning, is abbreviated.

⁹³ Such issues include, but are not limited to, innovations posited by the revision, such as abolition of the section 2-201 writing requirement in Revised Article 2, and adjustment of the filing system in Article 9.

⁹⁴ Consumer representatives have become more active in the UCC drafting and revisions processes and, therefore, large institutional providers of goods and services to consumers are

whatsoever.⁹⁵

It is difficult to gauge the level of preparation of the members of the Drafting Committee and observers prior to the meeting. There are some who have perused the draft with great care, and there are others who attend more to take notes and report back to their constituencies than to influence the formulation of any particular section. Some of the members of the Drafting Committee and observers are expert in the specific commercial law issues on the table; others are more novice. There are no substantive admissions criteria, but the cost of attending certainly may have an impact on the composition of the group in attendance.⁹⁶

The tenor of the discussion/debate will depend on the stage of the drafting process: the earlier along, the less specific the language choices must be. There will be discussions of principle as well as syntax and vocabulary. But through the course of the several meetings, the black letter of the statute emerges. There is compromise, but some belligerence too. The black letter is picked at and prodded until the Drafting Committee is satisfied with it, or until the Committee decides it needs the reporter to go back and do some more work.

Once a year during the drafting process, the draft is "read" before the annual meeting of the NCCUSL.⁹⁷ The draft is actually read, word by word, and, depending on the reader, punctuation may not be omitted. The process is tedious but very effective. While it is probably the case that most of the commissioners in attendance who are interested in the commercial law have read the draft with some care prior to the meeting, actually reading the draft at the meeting assures that the discussion stays focused and that nothing is overlooked. All that is read, however, is the black letter. Though reference may be made to notes appended by the reporter to particular sections, there is no official reading of the commentary. It has likely not yet been drafted.

At several junctures during the course of the reading, individual commissioners will rise to ask questions of the reporter or Drafting Committee

increasingly poised to defend the status quo. For example, in the Article 2 process, the advertising industry and consumer representatives have "faced off" on issues concerning the scope and operation of the express warranty rules. For the tenor of the advertising industry's reaction to proconsumer initiatives, see Memorandum from Advertising Group to NCCUSL (July 2, 1996), and Memorandum from NIMA Int'l to NCCUSL (July 3, 1996) (both on file with authors).

⁹⁵ For example, abrogation of the role of "seals" in sales transaction (U.C.C. § 2-203) consistently fails to generate heated debate.

⁹⁶ To its great credit, the NCCUSL has endeavored to increase the level of consumer interest participation. See Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1573 (1994).

⁹⁷ See Bugge, *supra* note 81, at 17.

members, or will criticize a formulation of the black letter or ask for a vote on a matter of policy. If there are votes, they are voice votes: the loudest side prevails, which may mean whichever side votes last and has the opportunity to adjust decibel level accordingly.⁹⁸ While observers who pay the fee to attend the meeting can listen to the commissioners' deliberations and can approach individual commissioners to urge them to raise a point on the floor, noncommissioners generally do not have "floor privileges."⁹⁹

By the time the black letter has been read the requisite number of times at the annual meeting,¹⁰⁰ it is polished. That does not mean it is perfect,¹⁰¹ but there will not be any formulation or conception in the black letter that the commissioners (and others at Drafting Committee meetings) will not have had several opportunities to review. The NCCUSL does a very effective job of maintaining the openness of its process, at least so far as public debate is concerned. That candor is in the interest of NCCUSL, because once the Conference promulgates a uniform act, its work has only begun. It must then "sell" the act to the state legislatures, as close to intact, read "uniform," as possible.

⁹⁸ See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS 431 (1986). Floor votes are usually one-person-one-vote. However, any commissioner may call for a vote by states on any issue. The final approval of an Act is by state. See *id.*

Mr. McCabe explains that within the drafting committees an oral vote is used, due primarily to the small number of participants. At the annual meeting, business is conducted by a committee of the whole. Motions can be raised from the floor on any matter, so long as the movant is a commissioner. The chairman of the committee of the whole will from time to time, in the interest of keeping things moving, call for additional motions. The votes on these motions are generally voice votes. A commissioner can call for a count, which is done simply by counting those standing and those sitting. Any commissioner can also call for a state-by-state vote, where each state gets only one vote. Written votes are not taken. See Telephone Interview with John McCabe, *supra* note 78.

⁹⁹ Representatives of the ABA and the ALI, even when not members of the Drafting Committee, may be granted floor privileges: the opportunity to speak before the annual meeting with regard to issues raised by the draft being read.

¹⁰⁰ The NCCUSL rule is that each Act must be read two times before it can be promulgated by the commissioners. Though projects may, and often do, continue for three or more years, and therefore are read three or more times at the annual meeting. See Telephone Interview with John McCabe, *supra* note 78.

¹⁰¹ For example, Article 2A—Leases, as originally promulgated by the NCCUSL in 1987 contained deficiencies discovered by several commentators in a symposium issue of the *Alabama Law Review*. See Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988). As a result, the commissioners promulgated uniform amendments of Article 2A, which resulted in a revised uniform text.

B. *The Formulation of the Comments*

To compare the genesis of the official comments with that of the black letter (to the extent that such a comparison is accessible), it is necessary to pursue a tripartite inquiry, first, focusing on the treatment of the comments during the process of drafting the black letter, second, describing the work of the reporter on the comments after the black letter has been approved by the sponsoring organizations, and third, contrasting the treatment of the development and promulgation of UCC comments with other bodies of official commentary pertinent to the construction of commercial law. This portion of our investigation will reveal that courts may afford deference to the comments that is inappropriate given their dubious foundation in the drafting process.

1. *Consideration of the Comments During the Code Drafting Process*

As described in the preceding section of this Article, the focus of the Drafting Committee meetings is on the black letter of the commercial law. There is no systematic consideration given to commentary, official or otherwise, for (at least) two reasons: The comments have not been drafted at the time the Drafting Committee and observers consider the black letter at the several two and one-half day meetings held to work on the draft, and, perhaps most crucially, the sponsoring organizations never review the comments when voting to promulgate the new or revised uniform law.¹⁰² So not only is there no opportunity for the Drafting Committee and observers to review the commentary, but there would be nothing at stake, so far as ALI and NCCUSL approval is concerned, were the group assembled to review the draft disposed to include a careful perusal of the comments along with the black letter.¹⁰³

That is not to say that the group assembled at Drafting Committee meetings is ignorant of the role and importance of the comments. It is not the least bit unusual for those commenting on the black letter to raise a reservation with particular language, but then to agree that any unfortunate construction of the language could be avoided by a comment explaining the limits of the black letter's logic.¹⁰⁴ And the issues that are relegated to "clarification" in the

¹⁰² See N.Y. COMM'N REPORT, *supra* note 4, at 64 ("[I]t should be noted that a *full explanation* of the 'reasons' for a provision might well, if submitted for 'approval,' arouse more controversy and take longer to get an agreement on, than would the text itself." (quoting Professor Edwin Patterson) (footnotes omitted)).

¹⁰³ See Skilton, *supra* note 55, at 603 n.17 (noting that although proposed comments go through an approval process before publication, this process is different than that used for textual changes to the UCC and thus should not be afforded weight as legislative history).

¹⁰⁴ With regard to the fit between a Revised Article 2 and the new *Restatement of*

comments may not be insignificant.¹⁰⁵

Even when someone suggests that the reporter clarify the operation of the black letter with a comment, and the reporter agrees to do so,¹⁰⁶ there may well never be an opportunity to follow that up, because, recall, the comments are not reviewed along with the black letter at the votes to promulgate. In fact, none of the comments will likely be available to interested groups and observers *or to the members of the Drafting Committee* until the black letter is approved.

2. *The Reporter's Work on the Comments*

The official comments to the *Uniform Commercial Code* are the work, primarily if not exclusively, of one person: the reporter.¹⁰⁷ Of course, there is probably no better single person to do the work, given the selection process that identified the reporter and the fact that the black letter is primarily the work of that reporter.¹⁰⁸ It is not at all clear, however, that it makes much sense to trust

Products Liability, the Director of the ALI, Professor Geoffrey C. Hazard, Jr., proposed alternative means of accommodating, making consistent, the two projects, both of which are sponsored by the ALI. Professor Hazard proposed that a comment be included with the black letter to make clear that "[a] claim that the goods are non-merchantable in breach of the warranty defined in [s]ection 2-314 is governed by the substantive products liability law defining product defect. Goods not defective under products liability law may nevertheless be found to be in breach of the warranty defined in [s]ection 2-313 or in [s]ection 2-315. [The first sentence of this comment would also be included in the comment to section 2-314.]" Letter from Geoffrey C. Hazard, Jr., Director, ALI, to UCC Article 2 Drafting Committee (Jan. 22, 1996).

¹⁰⁵ See *id.*; see also *Northern Ind. Pub. Ser. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277 (7th Cir. 1986) (Posner, J.). Judge Posner ruled that the official comments to section 2-615 ("Commercial Impracticability") did not operate to protect the buyer because Indiana had not adopted the official comments. Application of the official comment would have extended the black letter to afford buyers the benefit of the impracticability defense; see *WHITE & SUMMERS*, *supra* note 42, at 13 ("When opponents of a draft section prevailed against the draftsman, the draftsman would sometimes revise the draft accordingly, but seek to preserve the old draft in the footnotes.").

¹⁰⁶ One commentator has labelled this by-product a "negotiated comment"—that is, a case where after the *text* has been agreed upon, a still troublesome point is negotiated by securing amendment of the comment, in order to get concurrence." See Skilton, *supra* note 55, at 618 n.39.

¹⁰⁷ "The practice in recent years has been for the [r]eporter (i.e., principal drafter) to draft [o]fficial [c]omments after the sponsors have approved the text. These [c]omments are subject only to the approval of the chair of the [D]rafting [C]ommittee." E. ALLEN FARNSWORTH, ET AL., *supra* note 47, at 11.

¹⁰⁸ See Walker, *supra* note 63, at 1000 n.40. As Attorney General William Mitchell ably stated: "Furthermore, I think it was Lord Bacon who said that a person who drafted a

the work of officially commenting on the uniform law to one person, or, even were it sensible to afford such deference, to then insulate that commentary from the type of careful procedure that assured the integrity of the black letter.

To understand the role of the comments, it is worthwhile to appreciate the design and object of the official commentary. The reporter may use the comments to put the black letter in perspective,¹⁰⁹ to describe the considerations that informed the balance struck by the black letter,¹¹⁰ and even to restate the black letter in more accessible terms.¹¹¹ It would certainly be illegitimate for the comments to expand on the law—to offer a construction of the black letter that goes beyond the terms of the particular provision. And it would not be likely that the reporter would try to undermine his product by surreptitiously amending the black letter in the commentary.

Insofar as courts look to, or are directed to, the comments when the black letter is not dispositive, it is clear that the comments may fill the interstices of the law in ways that go beyond the black letter, even if that was not the reporter's design.¹¹² The danger of that use of official commentary was recognized by the NCCUSL in the *Second Draft of the Revised Uniform Sales Act*, dated 1941:

document was least qualified to interpret it, because he always had in mind what he intended to say rather than what he actually said." *Id.*

¹⁰⁹ See, e.g., U.C.C. § 2A-304 cmt. 1 (1995) ("This section must be read in conjunction with, as it is subject to, the provisions of [s]ection 2A-303, which govern voluntary and involuntary transfers of rights and duties under a lease contract, including the lessor's residual interest in the goods.").

¹¹⁰ See, e.g., U.C.C. § 2-318 cmt. 3 (1995) ("[T]he section [2-318] in this form [Alternative C] is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.").

¹¹¹ See, e.g., U.C.C. § 2-207 cmt. 3 (1995):

Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

¹¹² Also, courts have relied on the comments before the particular version of the text had been adopted by the relevant state. See, e.g., *New England Merchants Nat'l Bank v. Old Colony Trust Co.*, 417 N.E.2d 471, 474-75 (Mass. App. Ct. 1981), *aff'd*, 429 N.E.2d 1143 (Mass. 1982); *In re Doughboy Indus. Inc.*, 233 N.Y.S.2d 488, 495-96 (N.Y. App. Div. 1962).

[T]here is no clear room in our doctrinal scheme of statutory construction for legislative intent to be found *with clarity and precision* in the acts or declarations of persons who have no official connection with the actual passage of the legislation. This makes use of the [c]omments of the [NCCUSL] anomalous.¹¹³

That excerpt reminds us that the reporter, though anointed by the ALI and NCCUSL, has not been *elected* to write the law and has no legislative authority beyond the states' enactment of the black letter that has been the subject of the careful deliberations of the members of the ALI and the NCCUSL in addition to all of the other interested constituencies whose participation in the drafting process may have had an impact on the black letter. The sponsoring organizations do not approve the comments.

In fairness, it is necessary to acknowledge that the comments, though drafted by the reporter and not subject to the careful scrutiny reserved for the black letter, may well reflect the conclusions of persons other than the reporter, in at least a few different ways.

First, the reporter essentially may be writing the comments throughout the course of the black letter drafting process. Quite often at the Drafting Committee meetings as well as in the reporter's meeting with members of the ALI¹¹⁴ and during the annual readings before the NCCUSL individuals or groups of individuals suggest that a conception captured in the black letter can be clarified in the comments. And the reporter may be admonished to offer such a clarification in the comments when he writes them. Presumably, someone keeps careful enough notes to know whether the final product actually contains the appropriate commentary.¹¹⁵

Second, the reporter may, and probably usually does, seek the advice of others with either particular expertise in the subject matter of the commentary or particular concern about the pertinent black letter. In that way, the reporter assures that the comment will be responsive to the specific context in which the black letter will operate. But there is no published requirement that the reporter seek such counsel or that the reporter defer to the judgment of others in drafting the comment. Indeed, even were an individual or constituency troubled by the language in a comment, there would not be a setting, short of the individual state legislatures, in which objection to the comment could have an impact on

¹¹³ UNIFORM REV'D SALES ACT § 1-A cmt. 2 (Report & Second Draft 1941).

¹¹⁴ During the course of a drafting project, the reporter will meet with the members of the ALI Council, the Member's Consultative Group, and, at the annual meetings, with the general membership of the ALI.

¹¹⁵ The Annual Proceedings of the ALI will contain a transcript of comments made at the annual meeting, and a tape recording of the comments of the other meetings are made available to the reporter, who may well take notes of his own during any of the meetings.

the promulgation of the uniform law.

Also, occasionally, third parties might be invited to contribute to the drafting of a comment if they have devoted particular attention to a topic treated in the black letter and identified an ambiguity in the black letter that the comment could resolve. Given the timing of the drafting process, this would likely not be a common practice, but it does suggest a means to augment the comment drafting process.

Fourth, commentary from prior versions of the Code may be incorporated into the new uniform law if practice has demonstrated that particular commentary has been worthwhile. This means of enhancing the authority of the commentary is most viable when the uniform law is being revised rather than drafted for the first time. Even in the case of new uniform law, such as UCC Articles 2A and 2B, there is sufficient common ground with existing uniform commercial law, *i.e.*, Articles 2 and 9, to support the incorporation of commentary from analogous contexts into the new formulations. Yet the problem remains that in the choice of what and how much of the old to incorporate into the new, the reporter's choices are unchecked, but at least the commentary would have been carried forward because it has stood a test of time. Presumably, had it done more harm than good, the black letter would have been cleaned up to avoid any confusion caused.

Fifth, the individual state bodies that review NCCUSL products prior to their being introduced in the state legislatures will have both the black letter and the official comments before them in determining the form that the uniform law should take in their particular state. In some states, there are law revision commissions established to review and prepare legislation prior to its introduction in the state legislature.¹¹⁶ While it is difficult to generalize about the form and function of these commissions, some observations about a not atypical process, the Alabama model, gives a sense of the role these review panels may serve in the uniform commercial law movement with regard to both the black letter and the official commentary.¹¹⁷

After the NCCUSL promulgated Article 2A of the UCC, "Leases," the Director of the Alabama Law Institute, Robert McCurley, empaneled a committee of commercial attorneys¹¹⁸ to determine whether the uniform law should be proposed to the Alabama legislature by the Alabama Law Institute.

¹¹⁶ This is the case, for example, in New York and Alabama.

¹¹⁷ Professor Peter Alces was the Alabama Reporter for Article 2A, and the observations in this portion of the essay are based on his work on that project.

¹¹⁸ The members of the Alabama committee were J. Robert Fleenor, Chair, Douglas T. Arendall, H. Hampton Boles, Andrew P. Campbell, Ralph Franco, John B. Givhan, William Hairston, Neil Johnston, Jim Klinefelter, Barry S. Marks, Elbert H. Parsons, Jr., Joseph Stewart, and Mike Waters.

One of the authors of this Article was appointed by Mr. McCurley to work with the Alabama Committee as an Alabama State Reporter to review Article 2A, section by section and official comment by official comment. The members of the Alabama Committee reconsidered every policy and language choice made by the Committee that had drafted the uniform version of Article 2A, and where the Alabama Committee deemed necessary, made changes both to conform the uniform law to the existing Alabama commercial law, and to improve upon the product of the ALI and NCCUSL in instances where the Alabama Committee believed it could improve upon the uniform law.

While every deference was afforded the uniform law, the Alabama Committee was very active in its review of Article 2A. Even though very few portions of the uniform law were adjusted at all, the members of the Alabama Committee realized that when the proposed statute was introduced to the state legislature, it might be necessary to defend all of the choices made by the uniform law. In the course of this review, the official comments were read closely with the black letter and were subject to adjustment¹¹⁹ if the commentary went beyond or simply did not fit the black letter. Additionally, as part of the Alabama Committee's review process, the Alabama Reporter drafted Alabama commentary which was included with the uniform black letter and official commentary in the final legislation.¹²⁰ The Alabama commentary was reviewed by the members of the Alabama Committee before the legislation was introduced in the state legislature.

In the case of states such as Alabama, then, which systematically peruse both the black letter and official commentary with great care before the uniform law is introduced in the state legislature, there is an independent check on the uniform law reporter's official comments before the legislature acts on those comments. But still the problem remains that the legislature, as such, never really participates in the development of this form of "legislative history." The work is done by an unelected committee and often reflects the conclusions of no one other than the reporter. The members of any review committee could not possibly anticipate the contexts in which particular official commentary might be pertinent to construction of the statute and so may well not appreciate the consequences of the reporter's conclusion.

While there are some checks, then, on the reporter's discretion and judgment in formulating the comments, often the source of the courts' identification of the purpose of the black letter, the checks are far from perfect given the weight that the courts may afford the comments.

¹¹⁹ See, e.g., ALA. CODE §§ 7-2A-406, -506 (1993).

¹²⁰ See, e.g., *id.*

3. *The Comments Compared with Other Forms of Official Commentary*

Notwithstanding the curious nature of "legislative history" that takes the form of comments promulgated by those who are not legislators, there seems to be an irresistible impulse on the part of the uniform law drafters to share with those who would apply the law the drafters' sense of how the law should be applied. That is probably because there is something inevitable about purposive interpretation. So long as judges construe statutes, they will not be inconsiderate of the statute's purpose, and so long as purpose matters, it will be difficult for judges to ignore the drafters' statements of purpose.

To fix the proper role of the comments it is worthwhile to acknowledge analogous forms of commentary, that provided by drafters as well as by third parties with at least as good a sense of the commercial dynamic and the black letter's reaction to it. Two analogous forms of commentary warrant attention: the reporter's notes and comments to Restatements of the Law—the products of the ALI—and the UCC commentary published by the PEB of the *Uniform Commercial Code*. Both may provide useful models for emulation in future UCC revision and drafting processes.

a. *Commentary to the Restatements of the Law*

The Restatements of the Law endeavor to formulate the evolved principles in more or less discrete areas of the law in order to provide guidance to courts applying those principles in recurring transactions. That may be an oversimplification, but it suffices to describe the object of the ALI when it promulgates the Restatements. Of course, the Restatements are not enacted law in any state, though they may reflect the statutory formulations that are enacted law in the states. Existing statutes¹²¹ as well as common law rules¹²² may provide the substance of the Restatement provisions.

An area of the law may well be treated in an ALI Restatement rather than an ALI/NCCUSL article of the UCC because there are simply not sufficient funds in the NCCUSL's budget to support another UCC revision effort. To some extent, that would explain why, in the first instance, the *Restatement of Suretyship and Guaranty* was not promulgated as a new Article 3A of the UCC. So the difference between a Restatement of an area of the law and a codification of an area of the law may be more a matter of finances than

¹²¹ See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 1 cmts. b, c, (1996) (describing state statutory law's impact on the Restatement).

¹²² See *id.* § 1 cmts. b, e, f, h, k, l, n, & § 4 cmt. c (describing effect of common law on Restatement).

jurisprudence.¹²³ Indeed, while early Restatements did not have the same texture as statutes,¹²⁴ the more recent Restatements look a good deal like statutes.¹²⁵

The extent, then, that an area of law is "restated" rather than "codified" in the UCC, may well intimate nothing about the reasons for the project or the composition of the final product. There is no jurisprudential reason (or political reason, for that matter) that the commentary accompanying the Restatements should differ substantially from the commentary accompanying revisions of the UCC. But there are, indeed, substantial differences; the UCC comments do not compare favorably.

As drafts of new Restatements are prepared by the reporter, the advisors (akin to the UCC Drafting Committee) review both the black letter as well as the reporter's notes¹²⁶ and the proposed comments. The advisors may offer suggestions on the drafting of the comments and on the relationship between the black letter and commentary. The comments are drafted as the black letter is drafted and each level of ALI review contemplates review of both elements of the Restatement.

It is not immediately clear why a similar procedure could not inform the UCC revision process. Indeed, insofar as the ALI is a co-sponsor of the Code, it is not clear why the ALI does not currently require that the UCC revisions follow the same process as the Restatements. This could be, and we suggest, should be, treated explicitly in the agreement between the ALI and NCCUSL with respect to the *Uniform Commercial Code*.¹²⁷ Certainly the members of the ALI should insist upon this, and it is not clear why or even if the NCCUSL would resist.

b. *Permanent Editorial Board Commentary to the Code*

The UCC is organic, by which we mean no less than that it is as close to a

¹²³ The sponsoring organizations may have access to different pools of funds depending upon whether the product under study is to be a restatement or a model law. See Telephone Interview with John McCabe, *supra* note 78.

¹²⁴ The earlier Restatements often read as statements of principle rather than as statutes. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); RESTATEMENT (SECOND) OF TORTS § 261 (1965).

¹²⁵ See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY §§ 37, 49, 62 (1996).

¹²⁶ These reporter's notes describe the research base supporting the reporter's formulation of a provision or comment. See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 38A, Reporter's Introductory Note (Tentative Draft No. 4, 1995).

¹²⁷ Cf. *Agreement*, *supra* note 81, § B(5) (concerning the composition and function of the PEB).

living, breathing, reacting thing as a statute can be. Karl Llewellyn and Grant Gilmore, as well as the other midwives present at the Code's creation, recognized that the Code could only work so long as it reflected and supported better commercial practices, however such practices should evolve.¹²⁸ Because the UCC is state law, enacted separately in the several states, adjustment of Code provisions in response to fluctuations in the commercial breeze are not possible. The Code was drafted in flexible terms, sufficient to provide the triers of fact and law the means to effect the immanent justice of a situation.¹²⁹

In light of that fixed but necessarily fluid character of the Code, it is not surprising that the ALI and NCCUSL created a Permanent Editorial Board to monitor the Code and the commercial law to assure that the objects of the UCC are not frustrated:

It shall be the function of the PEB to discourage amendments or additions to the Uniform Commercial Code not authorized pursuant to [the agreement between the ALI and NCCUSL], to assist in attaining and maintaining uniformity in state statutes governing commercial transactions, and to monitor the law of commercial transactions for needed modernization or other improvement.¹³⁰

The PEB, composed of leading commercial authorities,¹³¹ is authorized by the ALI/NCCUSL agreement to "prepar[e] and publish[] supplemental [c]omments or Annotations to the Uniform Commercial Code and other articulations as appropriate to reflect the correct interpretation of the Code and issu[e] the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law"¹³² The PEB, pursuant to that directive, subsequently adopted a "Resolution on Purposes, Standards and Procedures for PEB Commentary to the UCC," which provides a deliberate and conscientious process by which the commentaries would be

¹²⁸ For a discussion of "Code Jurisprudence," see Peter A. Alces, *A Jurisprudential Perspective for the True Codification of Payments Law*, 53 FORDHAM L. REV. 83 (1984).

¹²⁹ Karl Llewellyn thought of this process as involving "situation sense," a term that has caused some debate among commentators attempting to define it. It refers to "true understanding" of facts and "right evaluation" by judges who are experienced in life and possess a general sense of equity. See TWING, *supra* note 1, at 216-17. A judge applying situation sense would have experience and a grasp of the usage and ethics of the commercial trade, as well as of the manner in which the transaction in question generally was conducted, in order to determine the solution to the problem most reasonable and acceptable to the commercial community. See *id.* at 225.

¹³⁰ *Agreement*, *supra* note 14, § B(5).

¹³¹ See *id.* § B(1).

¹³² *Id.* § B(5)(b).

developed. To emphasize the care with which the commentaries are prepared it is appropriate to reproduce the pertinent portion of the enabling resolution:

The process by which *PEB Commentary* is prepared and issued by the PEB should be flexible, but usually should include:

- a. periodic publication of the topics under consideration by the PEB with a request for comment by interested persons by a stated date as to whether any listed topic should be deleted or a related topic added and as to the appropriate resolution of the issues presented by the topics under consideration;
- b. selection of one or more appropriate advisers, who are not members of the PEB, to review any comments submitted by interested persons and other relevant materials and to prepare a tentative adviser's draft of the proposed *PEB Commentary*;
- c. publication of the adviser's draft of the *PEB Commentary*, after supervisory review of the PEB, soliciting comments by interested persons by a stated date on the substance and style of the work;
- d. approval by the PEB of the substance and style of the *PEB Commentary* as finally submitted by the adviser(s) and comments submitted by interested persons or, when warranted, the withdrawal of the proposal with the reasons for withdrawal stated; and
- e. periodic publication of such *PEB Commentary* as is approved by the PEB on a regular schedule.¹³³

The ALI and NCCUSL, then, clearly contemplate a role for official commentary and recognize the importance of developing that commentary in a manner that assures full consideration of the issues. In fact, the procedure described in the foregoing excerpt would seem to guarantee the same care in drafting PEB commentary that attends the UCC black letter drafting process. It is curious that the PEB commentaries, which are not a part of the enacted law in any jurisdiction, are drafted with more ALI/NCCUSL attention, and much broader participation, than are the UCC comments, which are enacted with the black letter in a significant number of states¹³⁴ and which are afforded law-like

¹³³ Permanent Editorial Board, Resolution on Purposes, Standards and Procedures for PEB Commentary to the UCC § 2 (Mar. 14, 1987) (reproduced in the 1994 edition of the UCC).

¹³⁴ States that enact the comments along with the black letter include Alabama, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio,

deference by the courts. Similarly, the comments and reporter's notes to the Restatements are drafted with substantially more opportunity for review and participation than are the UCC comments; and the Restatement commentary, of course, is not the enacted law in any jurisdiction.

V. CONCLUSION

Statutory ambiguity is common. In the face of ambiguity, outcomes must turn on interpretive principles of various sorts; there is simply no other way to decide hard cases. Karl Llewellyn, who saw the traditional canons of constructions as vacuous and self-contradictory,¹³⁵ contended that courts should follow the practice of construing language in light of purpose.¹³⁶ His view that the Code and a technical type of construction are incompatible can be found in the expression of underlying purposes and policies contained in section 1-102 and the emphasis in the comments that "the text of each section should be read in the light of the purpose and policy of the rule or principle in question"¹³⁷ On this view, purposive interpretation also serves as a crucial mechanism for keeping the Code current by permitting courts to respond to changing conditions and mores.¹³⁸

To say this is not to say, however, that the Code's purpose and policies will

Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin. See U.C.C. Rep. Serv. (CBC) (State U.C.C. Variations Binder 1996).

Some courts seem to have assumed that the comments were actually approved by the NCCUSL and the ALI and represent the opinion of these bodies. See, e.g., *In re Rivet*, 299 F. Supp 374 (E.D. Mich. 1969); *In re Anthony*, 835 P.2d 811 (N.M. 1992). This assumption is unsound, however, as a review of UCC history fails to show a single state which has adopted the comments in the sense that they have been made part of the legislation. See *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505, 508-09 (Okla. 1978); *Burchett v. Allied Concord Fin. Corp.*, 396 P.2d 186, 190 (N.M. 1964); see also JOHN HONNOLD, *CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING* 12-13 (5th ed. 1984) ("The most obvious point about the [c]omments is the one which . . . is most often overlooked: The text to the Code [is] enacted by the legislature; the [c]omments [a]re not."). Yet, some courts have referred to the comments as being "adopted," see *Consolidated Film Indus. v. United States*, 547 F.2d 533, 537 (10th Cir. 1977), and the *U.C.C. Reporting Service* indicates that the comments have been "adopted" in some states. See U.C.C. Rep. Serv. (CBC) (State U.C.C. Variations Binder 1996).

¹³⁵ See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 399-400 (1950).

¹³⁶ See Karl Llewellyn Papers, *supra* note 1 and accompanying text.

¹³⁷ See U.C.C. § 1-102 cmt. 1 (1985).

¹³⁸ See *supra* notes 12-14 and accompanying text.

always be readily apparent and not in conflict. Our goal in this Article has been to present an empirically informed guided tour of several of the available sources of Code policy. We have concluded that the comments are potentially the single best source for determining purposes and policies. But a comprehensive picture, based on the best available evidence, suggests that the comments are produced by a system that behaves quite differently from what is widely assumed.

When we compare the UCC comments drafting process with that supporting analogous products of the sponsoring organizations, it becomes obvious that the official commentary afforded the greatest, perhaps even unwarranted, deference in the commercial law is the commentary supported by the least participatory drafting process. This is a significant shortcoming in the commercial law that was recognized, over half a century ago, by NCCUSL, but which still persists as the UCC has been substantially redrafted in the last decade. While it might not be appropriate to place all of the blame on the ALI and NCCUSL for the role that the UCC comments have played in the commercial law, it is the sponsoring organizations that are in the best position to correct the incongruity.